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NEW YORK, NEW YORK
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ARNOLD & PORTER

1200 NEW HAMPSHIRE AVENUE, N.W.
WASHINGTON, D.C. 20036-6885

(202) 872-6700
CABLE: "ARFOPO"
FACSIMILE: (202) 872-6720
TELEX: 89-2733

LOS ANGELES, CALIFORNIA
TOKYO, JAPAN

WILLIAM E. COOK, JR.
DIRECT LINE: (202) 872-6996

December 16, 1994

BY HAND

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Comments of NATOA and the City of New
York in Response to the Third Further
Notice of Proposed Rulemaking in
CC Docket No. 87-266 and RM-8221

Dear Mr. Caton:

Please find enclosed, on behalf of the City of New York and the National Association of Telecommunications Officers and Advisors, an original and nine (9) copies of Comments in response to the Third Further Notice of Proposed Rulemaking in the above-referenced proceedings.

Thank you for your attention to this matter.
Please call the undersigned if you have any questions.

Sincerely,

William E. Cook, Jr.
William E. Cook, Jr.

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20054

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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20054

In the Matter of

Telephone Company-
Cable Television
Cross-Ownership Rules,
Sections 63.54-63.58

and

Amendments of Parts 32, 36,
61, 64 and 69 of the Commission's
Rules to Establish and Implement
Regulatory Procedures for
Video Dialtone Service

CC Docket No. 87-266

RM-8221

TO: The Commission

**COMMENTS OF
THE NATIONAL ASSOCIATION OF
TELECOMMUNICATIONS OFFICERS AND ADVISORS
AND THE CITY OF NEW YORK**

Norman M. Sinel
Stephanie M. Phillipps
William E. Cook, Jr.

ARNOLD & PORTER
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 872-6700

Counsel for the Local Governments

Date: December 16, 1994

SUMMARY

In the Notice, the Commission requested comments on, among other things, whether: (a) the Commission should grant preferential access to video dialtone for certain classes of public, educational and governmental ("PEG") programmers; (b) local exchange carriers ("LECs") should be permitted to acquire existing cable facilities in certain markets in their service areas in order to provide video dialtone service; (c) the Commission should adopt proposals that would permit the expansion of capacity on video dialtone platforms so that video dialtone providers can meet demands for access to the platform; and (d) the Commission should adopt a rule that would prohibit a LEC that provides video dialtone service from unreasonably denying access to its poles and conduits to competing multichannel video programming distributors.

The Local Governments strongly support the concept of preferential access for PEG programmers. A rule creating preferential access would promote the Commission's First Amendment goal in this proceeding of "fostering the availability to the American public of new and diverse sources of video programming."

Subject to certain conditions, the Local Governments also support rules that would encourage the expansion of channel capacity on the video dialtone

platform and rules prohibiting a LEC from unreasonably denying access to its poles and conduits to competitive multichannel video programming distributors. Such rules would promote the Commission's goal of "facilitating competition in the provision of video services." The Local Governments strongly oppose a rule that would permit LECs to acquire the cable facilities in certain markets in their service areas in order to provide video dialtone service, given that such a rule would severely undermine the Commission's competitive goals and would not be in the public interest.

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RM-8221

**COMMENTS OF
THE NATIONAL ASSOCIATION OF
TELECOMMUNICATIONS OFFICERS AND ADVISORS
AND THE CITY OF NEW YORK**

The National Association of Telecommunications Officers and Advisors and the City of New York (collectively, the "Local Governments") submit these comments in response to the Third Further Notice of Proposed Rulemaking ("Notice") issued by the Federal Communications Commission ("Commission") in the above-captioned proceeding.

I. **INTRODUCTION**

In the Notice, the Commission requested comments on, among other things, whether: (a) the Commission should grant preferential access to video dialtone for certain classes of public, educational and governmental ("PEG") programmers and not-for-profit programmers; (b) local exchange carriers ("LECs") should be permitted to acquire existing cable facilities in certain markets in their service areas in order to provide video dialtone service; (c) the Commission should adopt proposals that would permit the expansion of capacity on video dialtone platforms so that video dialtone providers can meet demands for access to the platform; and (d) the Commission should adopt a rule that would prohibit a LEC that provides video dialtone service from unreasonably denying access to its poles and conduits to competing multichannel video programming distributors.

The Local Governments strongly support the concept of preferential access for PEG programmers. A rule creating preferential access would promote the Commission's First Amendment goal in this proceeding of "fostering the availability to the American public of new and diverse sources of video programming." Notice at ¶ 3. The Local Governments have set forth below some of the issues the Commission will need to address in implementing a preferential access policy. However,

assuming the Commission decides to implement a preferential access policy, the Local Governments urge the Commission to issue a further notice of proposed rulemaking that would permit interested parties to provide substantive comments on the rules that should be established to implement such a policy.

Subject to certain conditions, the Local Governments also support rules that would encourage the expansion of channel capacity on the video dialtone platform and rules prohibiting a LEC from unreasonably denying access to its poles and conduits to competitive multichannel video programming distributors. Such rules would promote the Commission's goal of "facilitating competition in the provision of video services." See Notice at ¶ 3.

The Local Governments strongly oppose a rule that would permit LECs to acquire the cable facilities in certain markets in their service areas in order to provide video dialtone service, given that such a rule would severely undermine the Commission's competitive goals and would not be in the public interest.

II. DISCUSSION

A. Video Dialtone Services Should Grant Preferential Access to PEG Programmers

The Local Governments share the Commission's goal of fostering a diversity of information sources in the multichannel video programming services market. See Notice at ¶ 3. Preferential access requirements for PEG programmers would be essential to furthering this substantial governmental interest.¹ The Local Governments have set forth below some of the substantial governmental interests such requirements would serve,

¹ Local Governments believe that preferential access requirements for video dialtone providers would survive constitutional scrutiny since they serve a substantial governmental interest. Similar requirements on cable operators have been upheld. Most recently, the U.S. District Court for the District of Columbia upheld the constitutionality of the PEG requirements found in the 1984 and 1992 Cable Acts. Daniels Cablevision, Inc. v. United States, 835 F. Supp. 1 (D.D.C. 1993). The court held that the PEG requirements were content-neutral and served a significant regulatory interest. Id. at 6-7. Local Governments can think of no convincing reason why PEG requirements would not be similarly upheld on First Amendment grounds on video dialtone providers, particularly since such providers, unlike cable operators, exercise no editorial control over the content of programming transmitted over their facilities.

The Local Governments also believe that the governmental interest in promoting a diversity of information sources is a "strong public policy concern," and that there is a "compelling need" for the establishment of preferential access for PEG programmers to serve such a concern. See Notice at ¶¶ 255, 281. Therefore, the Local Governments believe the Commission has the authority under Sections 201(b) and 202(a) of the 1934 Communications Act, 47 U.S.C. §§ 201(b) & 202(a), to establish such requirements.

and have suggested certain general guidelines that might govern preferential access on video dialtone systems for PEG programmers. Assuming the Commission decides to adopt preferential access requirements, the Local Governments urge the Commission to issue a further notice of proposed rulemaking that would permit interested parties an additional opportunity to define the substantive provisions that would govern such access.

1. Preferential Access Requirements Are in the Public Interest

Congress recognized that PEG access channels "provide groups and individuals who generally have not had access to the electronic media with the opportunity to become sources of information in the electronic marketplace of ideas." H.R. Rep. No. 934, 98th Cong., 2d Sess. 30 (1984). Congress also recognized that such a "requirement of reasonable third-party access to cable systems [would] mean a wide diversity of information sources for the public -- the fundamental goal of the First Amendment -- without the need to regulate the content of programming provided over cable." Id.

Congress' hope that PEG requirements on cable operators would stimulate a diversity and abundance of information is being realized. Hundreds of PEG channels on cable systems today provide communities with

informational and educational programming, as well as televise local government proceedings of city councils and planning boards and informational programming about local government services and departments to the public. According to a study by the National Clearinghouse of Community Cable Viewership Research at Western Michigan University, close to 40% of cable subscribers view government meetings on governmental channels, 37% watch local arts and entertainment programs, 36% view educational programs, 35% watch sports programming, and 31% watch PEG access programming for health and fitness information. Moreover, according to the Alliance for Community Media, PEG access channels provide approximately 15,000 hours a week of local programming over cable systems.

The Local Governments believe that there is a similar substantial governmental interest in ensuring that consumers receive PEG access programming over a video dialtone system as well. To the consumer, video dialtone service is virtually indistinguishable from cable service since both services are a source of multichannel video programming. The only difference is that cable consumers are assured that they will receive local PEG programming since many cable operators are required by local franchise agreements to provide PEG channels, and frequently are required to provide PEG

facilities and equipment. Video dialtone service customers will not receive such programming unless video dialtone services are required to meet similar public interest obligations. There is no convincing reason for a distinction between the two services, and the Commission should adopt preferential access rules to ensure that consumers receive the diversity of information that both Congress and the Commission seek to promote.

2. The Commission Should Adopt Preferential Access Requirements that Promote a Broad Range of PEG Programming

The Local Governments support the provision of preferential access for PEG programmers and believe that the Commission should adopt preferential access rules that will encourage the provision of a broad array of PEG programming to consumers. To ensure that consumers receive a diverse source of local information, the Local Governments believe that the Commission should not only require that video dialtone providers grant PEG programmers preferential access, but that the Commission must establish a mechanism that ensures that PEG access channel capacity and transmission facilities are available, accessible and affordable to PEG programmers. Without such mechanism, the Commission's video dialtone policies may actually limit the diversity of information available to the public -- thus undermining its First

Amendment goals. It is likely that in the absence of such PEG requirements, the public will receive primarily commercial programming of national interest, at the expense of local public programming in the local public interest, since many potential sources of local PEG programming do not otherwise have the resources or capability of providing programming over video dialtone systems if the channel capacity must be purchased.

To ensure that customers receive a diversity of local programming, the Commission should not adopt rules that narrowly define the class of subscribers entitled to preferential access or that result in only a limited number of PEG programmers (e.g., those who can afford to pay for access) taking advantage of such access rules.

Preferential access for PEG programmers might include the following classes of programmers that seek to provide noncommercial programming: (a) state and local government entities; (b) elementary and secondary schools as defined in section 1471 of the Elementary and Secondary Education Act, and institutions of higher education as defined in section 1201 of the Higher Education Act; and (c) any non-profit organization entitled to tax-exempt status under Section 501(c)(3) of the Internal Revenue Service Code of 1986 that is formed for the purpose of providing nondiscriminatory public access to noncommercial educational, informational,

cultural, civic, or charitable services.² The Local Governments also believe that the governmental and educational entities should be granted preferential access at no charge. Preferential access for non-profit organizations also should be at no charge or at a rate not exceeding, if not lower than, the incremental cost to the LEC of providing channel capacity to such programmers.

Moreover, in addition to the above classes, the local governments believe that capacity on the video dialtone platform should be set aside for members of the general public to use as an electronic "public square" or "soapbox." Just as the members of the public who cannot afford to have a telephone in their homes have easy and affordable access to telephone service at public telephone booths, members of the public who cannot afford to lease their own channel to provide programming should have easy access to an "electronic telephone booth" over which they may transmit programming. Access to such "electronic telephone booth" should be provided on a first-come, first-served

² The proposed classes of educational and non-profit users are the same as the classes of educational and non-profit users that would have been entitled to public access under Section 103 of S. 1822, which was introduced last session of Congress by Senator Ernest Hollings.

basis. Such access might be for free or for a minimal user fee.

By defining the classes of programmers entitled to preferential access by objective and existing criteria and by granting most -- if not all -- such programmers access at little or no cost, the Commission could alleviate several concerns raised in the Notice. See Notice at ¶¶ 282-83. For example, the Commission would limit the need for the Commission to address "whether a LEC role in determining eligibility of specific video programmers for preferential treatment would be consistent with the common carrier framework governing video dialtone" since such eligibility would be determined by objective criteria established by the Commission, rather than by criteria established by the LEC. See Notice at ¶ 282. Moreover, by granting preferential access to any entity meeting the above definition of a PEG programmer, the Commission would eliminate the need to establish a "needs-based" test to determine who should have preferential access -- thus alleviating First Amendment concerns about a test that distinguishes among programmers within a class. Also, by granting PEG programmers access at no cost, the Commission would eliminate the need to determine what rate, or whether a series of rates for PEG programmers

based on need, should be established for preferential access.

The Local Governments do not believe that "discounted rates alone would meet [the Commission's] public policy goals." Notice at ¶ 283. The Commission must ensure that adequate capacity on a video dialtone platform is available for preferential access, and that the video dialtone service providers make transmission facilities available so that PEG-originated programming can be transmitted to the video dialtone system's headend and onto the system. In addition, to the extent appropriate, the Commission also might require that video dialtone providers provide studios, equipment and other support for the production of public access programming.

With regard to capacity, the Local Governments believe that as long as capacity on the video dialtone platform exceeds demand, there may be no need for a limit on the amount of capacity available for PEG purposes. To the extent capacity is limited, and it is economically and technically infeasible for the video dialtone service provider to expand capacity, the Local Governments believe that the Commission should ensure that sufficient capacity is available so that customers may receive a diversity of PEG programming. Local Governments believe that, at a minimum, 10 percent of

the capacity on the video dialtone platform should be reserved for PEG programmers.³ The Commission also might require that access to capacity dedicated for public use be allocated on a first-come, first-served basis, and might establish the number of hours per month any particular individual or organizational programmer may have access. Such requirements would limit First Amendment concerns that might arise if the video dialtone provider had to determine which users were entitled to access.

The Local Governments also believe it is essential to ensure that adequate program origination equipment, facilities and support are available to public programmers. Preferential access alone may be insufficient to promote a diversity of information if the intended beneficiaries of such access do not have the means to produce PEG-type programming. Requirements in cable franchise agreements for PEG equipment, facilities and support have been crucial to the success of the development of PEG programming on cable systems, and have helped to ensure that consumers receive essential local programming from programmers who may not

³ To the extent a video dialtone provider offers both digital and analog capacity, 10 percent of each type of capacity should be dedicated for PEG programmers.

otherwise have had the capability of producing PEG programming.

Support that video dialtone providers might provide should include, among other things, transmission facilities at local government and educational centers that would facilitate the transmission of city council meetings, other important governmental programming, and educational programming. Also, the Commission might require the establishment of regional community access facilities that might be used by members of the general public and qualified Section 501(c)(3) organizations to produce access programming.

Obviously, the Commission needs to consider ways that such PEG activities might be funded and administered. An obvious source for guidance would be the PEG experience in the cable industry. With regard to financing, many cable operators provide capital grants for the construction of PEG facilities and studios. Many operators also provide on-going financial support, operational funds and staff support for PEG activities, especially for public access activities.⁴ One possible way to finance PEG activities by video

⁴ In certain jurisdictions, governmental access activities may be funded out of the franchise fees paid by a cable operator, and educational institutions may have use of an educational access channel, but may not have been given any operational support.

dialtone services is to require video dialtone providers, and possibly the commercial programmers of video dialtone services, to contribute to a "PEG fund," which would be used to finance PEG activities.

With regard to administering PEG activities, many local governments are responsible for administering local governmental access channels on cable systems, whereas educational institutions may be responsible for the administration of educational channels. Public access channels may be administered by the cable operator or by a non-profit access corporation that has been established for this purpose. A similar administrative structure might be established for PEG channels on a video dialtone system.⁵

The Local Governments have briefly sketched above some of the considerations the Commission should take into account in establishing a preferential access policy. Obviously, the Commission will need to consider these issues in further detail, and the Local Governments urge the Commission to issue a further

⁵ It is important to note that different communities have different needs. Given the concerns the Commission has expressed about LECs administering preferential access requirements, the Commission might instead permit local governments, if they choose, to have a role in determining the preferential access requirements in their communities. A further notice of proposed rulemaking would assist the Commission in exploring the role that local governments might play in establishing preferential access requirements at the local level.

notice of proposed rulemaking to address the mechanics of providing meaningful PEG access on video dialtone systems.

B. The Commission Must Not Permit LECs to Acquire Cable Facilities to Provide Video Dialtone Services

Local Governments strongly agree with the Commission's "decision to retain [the] existing prohibition on the acquisition by telephone companies of cable facilities in their service area for the provision of video dialtone." Notice at ¶276. This prohibition is central to the Commission's goal in this proceeding to promote competition not only in the video and communications markets in general, but to cable operators in particular. See Notice at ¶¶ 4-5. Moreover, such a prohibition is necessary to ensure that cable companies do not attempt to evade the public interest obligations in cable franchising agreements by selling their facilities to telephone companies and then providing the same package of commercial programming over the video dialtone platform. Id.

The Commission must not now undermine these goals and protections by creating an exception that would permit LECs to acquire cable facilities, or permit LECs and cable operators to jointly construct video dialtone facilities, in those markets in which it is alleged that two wire-based multi-channel video delivery systems are

"not viable." See Notice at ¶¶ 276-79. The end result of such acquisitions and joint ventures would be that a locally-franchised monopoly provider of video programming service would be replaced by another monopoly provider that is not even subject to a franchise and beneficial public interest obligations. There would be no enhanced competition, and the public benefits of local franchising would be lost. Such a result would be unconscionable. The current ownership ban on the purchase by a LEC of cable systems in their service areas is a critical restriction if video dialtone is to achieve the desired goal of increasing competition in the provision of multichannel video programming.⁶

If, however, the Commission does adopt an exception to its current prohibition in certain markets where competition is not deemed viable, the Commission must impose on video dialtone systems in such markets

⁶ If the Commission creates any exception to its ban in such markets, it should be limited to permitting LECs to acquire cable facilities to provide video dialtone service only in exceptional circumstances. Such circumstances may exist where, for example, a LEC is the only entity capable of assuming the operation of a poorly performing (e.g., bankrupt) or abandoned cable system, and in such a situation the LEC should be required to enter into a cable franchise with the local jurisdiction, if the LEC is acting as a cable operator under federal law, or should be subject to public interest requirements similar to those imposed on the cable operator, if the LEC will upgrade and operate the system as a video dialtone system.

public interest obligations similar to those imposed on cable operators. Such public interest requirements would be necessary since a Commission rule permitting LECs to acquire existing cable systems would eliminate competition and the public interest protections inherent in a local franchise.

The local cable operator, at least, is subject to requirements that limit its ability to exploit its monopoly status.⁷ Such requirements include, among others: (1) requirements to provide PEG access capacity, facilities, equipment and support; (2) customer service and consumer protection standards; (3) must-carry requirements for local broadcast stations; (4) rate regulation; (5) technical signal quality standards; and (6) other public interest obligations in the operator's franchise agreement. The Commission has not imposed similar requirements video dialtone services.

⁷ A cable operator's monopoly status is a result of economic factors, and is not the result a governmentally-granted monopoly. Most operators have been providing service pursuant to a non-exclusive franchise agreement and many franchising authorities are prohibited by state law from granting exclusive franchises. Moreover, franchising authorities are prohibited by federal law from granting exclusive franchises and may not unreasonably refuse to award an additional competitive franchise. See 47 U.S.C. § 541(a)(1).

If a video dialtone system were allowed to acquire a cable system and become the new monopolist provider of multichannel video programming in a jurisdiction, it would have no obligation to continue providing the public benefits formerly provided by the cable operator. Thus, former cable subscribers would be deprived of such public interest benefits.

To ensure that such public interest benefits continue to be provided, the Commission must adopt rules that require that a video dialtone service meet comparable public interest obligations in those jurisdictions where it acquires a cable facility and begins to provide video dialtone service.

C. The Commission Should Prohibit LECs from Using Control Over Their Poles and Conduits to Thwart Competition, But Should Not Preempt State and Local Laws Governing Access to Poles and Conduits

The Local Governments support a rule that would prohibit LECs that provide video dialtone service from denying competitors reasonable access to their poles and conduits. However, the Local Governments believe that the Commission should clarify that such a rule would not excuse a LEC from complying with state and local laws, regulations and rules governing electrical systems on poles and in conduits.

Many municipalities and counties have adopted by ordinance the National Electrical Safety Code (NESC)

and/or the National Electric Code (NEC), or codes similar to these codes. These codes dictate, among other things: (1) minimum heights and spacing separations on poles for both high voltage electric and low voltage communications wires; (2) use and separation of wires in underground conduits; (3) minimum clearances over streets (and private property); (4) the standards for the safe installation of underground communication wires; and (5) the appropriate standards for grounding and bonding. Such state and local requirements are necessary to ensure that a LEC's poles and conduits are not used in a manner inconsistent with the public safety and welfare, and represent a legitimate exercise by state and local governments of their police power and authority over the safe and efficient use of public rights-of-way. The Commission should state clearly in any rule it might adopt regarding the access of competitors to a LEC's poles and conduits that such rule does not preempt state and local electrical codes. Such clarification is essential to ensure that LECs do not permit competitors access to poles and conduits in a manner that is a threat to the public safety and welfare.

**D. Although the Local Governments Support
Proposals to Expand Channel Capacity, Such
Expansion Should Be Consistent with the Needs
of Consumers and Customer-Programmers**

In general, the Local Governments would support proposals that encourage the expansion of capacity on a video dialtone platform to ensure that there is sufficient capacity to meet increased demands for access by customer-programmers. See Notice at ¶ 268-75. However, the Commission should not adopt any proposal that is technically and economically infeasible from a consumer standpoint. The Commission, for example, should not adopt any proposal that would result in significant rate increases for consumers, or that would force customers to buy expensive converter boxes to receive digital transmissions. Moreover, consumers should not be forced to subsidize the construction of expanded or digital capacity on a video dialtone system. Such costs should be borne by the video dialtone provider and the customer-programmers of such capacity. Any cost allocation rules for video dialtone providers should embody this principle.

Moreover, if a LEC expands the video platform to include digital transmission capability, it also should retain sufficient analog transmission capacity for programmers that deliver analog signals for transmission. Such analog capacity will ensure that